Supreme Court, U.S.
FILED

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No.

IN THE

Supreme Court of the United States

In re: FLORET, L.L.C. and MICHELE LEA EGGERT,
Petitioners.

ON PETITION FOR A WRIT OF MANDAMUS TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF MANDAMUS

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50 pp

QUESTION PRESENTED FOR REVIEW

The question presented for review is whether this Court should issue a writ of mandamus requiring the Eighth Circuit to rule on petitioners' duly filed, served, and briefed motion for appellate sanctions pursuant to 28 U.S.C. § 1927 and the Eighth Circuit's inherent power.

PERSONS AGAINST WHOM RELIEF IS SOUGHT

Gregory Karpenko and David Marshall, attorneys for respondents Rick Petry and Fredrikson & Byron, P.A.

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PETITION FOR A WRIT OF MANDAMUS

Petitioners respectfully petition for a writ of mandamus to review the failure to act by the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The district court's order (per Frank, J.) on appeal from bankruptcy court affirmed the bankruptcy court's decision in all respects (Appendix ("Pet. App.") 8a-14a) and is not otherwise published. The court of appeals' opinion (per Wollman, Heaney, and Melloy, JJ.) affirmed the district court;'s order in all respects (Pet. App. 4a-7a) and is published at 315 F.3d 904. The court of appeals' orders denying rehearing *en banc* (*id.* 2a) and stay of mandate (*id.* 1a) are not otherwise published.

STATEMENT OF JURISDICTION

On January 6, 2003, the court of appeals entered its opinion affirming the district court's order which had upheld the bankruptcy court's order which dismissed five of six defendants without leave to amend and imposed sanctions on petitioners' attorney in the amount of $3,535.[1] On February 14, 2003, the court of appeals summarily denied petitioners' petition for rehearing *en banc*, and, on February 26, 2003, the court of appeals summarily denied petitioners' motion to stay mandate. Petitioners invokes this Court's jurisdiction under 28 U.S.C. § 1651(a).

STATEMENT OF THE CASE

The underlying adversary proceeding involved the attempt by two-joint-and several judgment creditors, Floret, L.L.C., and Michele Eggert (collectively "petitioners"), to obtain a denial of the

[1] The dismissals of those five defendants without leave to amend and the award of Rule 9011 sanctions against petitioners' attorney are the subject of a contemporaneously filed petition for a writ of certiorari titled *Floret, L.L.C., and Michele Lea Eggert v. Thomas J. Sendecky, Gregory M. Hewitt, Hewitt Financial Services, Fredrikson & Byron, P.A., and Rick Petry*.

discharge of debtor Thomas M. Sendecky ("debtor Sendecky").[2] In addition to debtor Sendecky, petitioners' Complaint named five defendants: Thomas J. Sendecky, Gregory Hewitt, individually and d/b/a Hewitt Financial Network (the "Hewitt defendants" therein), and the law firm of Fredrikson & Byron, P.A., and one of its attorneys, Rick Petry (the "Fredrikson & Byron defendants" therein, herein the "Fredrikson & Byron respondents").

Petitioners commenced the adversary proceeding on September 24, 2001, with the filing of a Complaint and Jury Demand. Debtor Sendecky and the other five named defendants filed motions to dismiss and motions for Rule 9011 sanctions. Petitioners filed responses in opposition to each of those motions.

On November 29, 2001, a hearing of all of those motions was held in the bankruptcy court (Dreher, J.). From the bench, petitioners' Complaint was dismissed as to defendant Thomas J. Sendecky and the Hewitt and Fredrikson & Byron defendants without leave to amend, and, pursuant to Fed. R. Bankr. P. 9011(b)(2),[3]

---

[2] Petitioners Floret, LLC, a Minnesota limited liability company, is a judgment creditor of the debtor, Thomas M. Sendecky, said judgment for $16,253.19 having been entered on June 1, 2001, in favor of Floret, LLC, and Michele Eggert, jointly and severally, following the trial of the case of *Floret, LLC, and Michele Eggert v. Hewitt Financial Network, a sole proprietorship, and Gregory M. Hewitt, jointly and severally, and Thomas M. Sendecky*, Hennepin County District Court No. AC 99-015802 (Oliesky, J.). Petitioner Michele Lea Eggert, the sole member of Floret L.L.C, was a very close friend of the debtor from 1986 to 1999 and works sixteen hour days, six days a week, running her wedding and retail floral and home accessories business.

[3] "(b)By presenting to the court (whether by signing, filing, submitting, or later advocating) a petition, pleading, written motion, or other paper, an attorney or unrepresented party is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances, . . . (2) the claims, defenses, and

the bankruptcy court awarded costs and attorneys' fees to the Hewitt and Fredrikson & Byron defendants[4] and invited the submission of affidavits of such costs and fees. On December 7, 2001, the Hewitt[5] and Fredrikson & Byron defendants filed affidavits of fees and costs seeking $985 and $5,426, respectively, and petitioner filed an objection to those affidavits five days later. On December 21, 2002, petitioners filed a timely notice of appeal to the district court. On January 10, 2002, the bankruptcy court ordered entry of judgment of $985 and $2,550 against petitioners' attorney and in favor of the Hewitt and Fredrikson & Byron defendants, respectively, whereupon petitioners' appeal to the district court was amended to include review of those sanctions.

Petitioners' appeal was docketed in the district court on January 15, 2002, and the timely filing of petitioners' brief was followed by the timely filing of an answering brief by the Fredrikson & Byron defendants and the filing of a timely but abysmally deficient "memorandum in opposition" by the Hewitt defendants.[6] On February 28, 2002, and *before*

other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;"

[4] The motions for sanctions brought by debtor Sendecky and defendant Thomas J. Sendecky were denied as procedurally deficient, and debtor Sendecky's motion to dismiss was granted but with leave to amend. Petitioners filed a First Amended Complaint on December 20, 2001, and debtor Sendecky's motion to dismiss it was heard on January 7, 2002, and denied from the bench and in an Order filed on January 10, 2002. Accordingly, the appeal of the dismissal of debtor Sendecky was withdrawn by petitioners.

[5] The Hewitt defendants' attorney has withdrawn in the meantime due to an unexplained conflict of interest.

[6] The Hewitt defendants did not make a good faith effort to comply with Fed. R. Bankr. P. 8009 and 8010, and their attorney does not appear to have even read them. The

petitioners' time to file a reply brief had run, the district court filed an order which upheld the decision of the bankruptcy court in all respects. Petitioners immediately appealed from that order to the Eighth Circuit.

The Fredrikson & Byron respondents' answering brief to the Eighth Circuit was accompanied by a motion for appellate sanctions pursuant to Fed. R. App. P. 38.[7] On December 3, 2002, the Eighth Circuit cancelled the scheduled oral argument and declared that the appeal would be decided on the briefs and record. On January 6, 2003, the Eighth Circuit filed a published opinion affirming the district court's order in all respects and holding in pertinent part as follows as to the district court's issuance of its decision before petitioners' time to file a reply brief had run:

> We find no error in the district court's decision to issue its opinion before Floret filed its reply brief. Floret has failed to demonstrate that it had any additional arguments that had not already been advanced in its opening brief, nor does Floret cite any case law that suggests that the district court's actions constitute reversible error. *See City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 888 (9th Cir. 2001)

Pet. App. 6a-7a.

Hewitt defendants did not file a brief, addendum, or appendix. They instead filed a motion memorandum with an attached exhibit, did not even denominate it as a brief, and do not appear to have filed two copies along with the original of their non-Brief as required. It had no table of contents, nothing called an addendum or appendix, no table of authorities, no appropriate headings, and no observance of the required order of topics. The district court did not care.

7 "If a court of appeals determines that an appeal is frivolous, it may, after a separately filed motion or notice from the court and reasonable opportunity to respond, award just damages and single or double costs to the appellee."

In reaction to that and pursuant to 28 U.S.C. § 1927 and the inherent power of the Eighth Circuit, petitioners filed a motion for appellate sanctions on the grounds that the Fredrikson & Byron respondents' attorneys had deceived the Eighth Circuit into holding that the district court's action did not constitute reversible error. On February 6, 2003, and after having denied petitioners' petition for rehearing *en banc*, the Eighth Circuit summarily granted the Fredrikson & Byron respondents' appellate motion for sanctions in the amount requested ($3,955) but has never ruled on petitioners' appellate motion for sanctions. Petitioners' motion to stay mandate was summarily denied on February 26, 2003, and this petition for a writ of mandamus followed.

REASONS FOR GRANTING THE WRIT

I. Mandamus Is Warranted Because The Relief Sought Is Not Available In Any Other Court.

Petitioners want the Eighth Circuit to do what it has not done. *Afortiori*, no court other than this Court has the capacity to require the Eighth Circuit to do what it has neglected to do.

II. Mandamus Is Warranted To Require The Eighth Circuit To Fulfill Its Responsibility To Rule On Petitioners' Duly Filed Motion For Appellate Sanctions.

Petitioners moved the Eighth Circuit for an order imposing monetary sanctions on the Fredrikson & Byron respondents' attorneys for their knowingly false representations of law to that court and for their silence in the face of that court's dispositive reliance on those false representations. *See generally* Pet. App. 24a-30a. Such sanctions were sought under 28 U.S.C. § 1927 and the inherent power of the Eighth Circuit. *Id.* at 23a. A motion for appellate sanctions may be brought at any time prior to entry of a final judgment. *Mary Anne Pensiero, Inc. v. Lingle*, 847 F.2d 90, 99-100 (3d Cir. 1988). Section 1927 [Counsel's Liability For Excessive Costs] provides:

Any attorney or other person admitted to

> conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Moreover, Minn. R. Prof. Conduct 3.1 [Meritorious Claims and Contentions] provides in pertinent part: "A lawyer shall not . . . controvert an issue [in a proceeding] unless there is a basis for doing so that is not frivolous, ..." Comment 1985 to Minn. R. Prof. Conduct 3.3(a)(3) [Candor Toward The Tribunal] states in pertinent part: "Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal . . . . The underlying concept is that legal argument is discussion asking to determine the legal premises properly applicable to the case."

Like § 1927 sanctions, inherent power sanctions may be awarded by appellate as well as district court judges. *In re Kelly*, 841 F.2d 908, 917 (9th Cir. 1988). Since inherent power sanctions are indifferent to the underlying merits of a dispute, they serve a gap-filling function by permitting appellate courts to award sanctions to an appellant--whether prevailing or nonprevailing--or to a nonprevailing appellee. *Id.* at 917; *State Indus. v. Mor-Flo Indus.*, 948 F.2d 1573 (Fed. Cir. 1991).

In their answering brief to the Eighth Circuit, the Fredrikson & Byron respondents argued:

> Not surprisingly, Floret has offered no legal authority in support of its assertion that it had a mandatory right to file a reply brief or that the timing of the district court's decision compels this court to vacate the district court's decision. To the contrary, federal courts that have examined the issue have concluded that due process does not require a mandatory right to file a reply brief. *See*

> *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 888 (9th Cir. 2001); *NLRB v. Eclipse Lumber Co.*, 199 F.2d 684, 686 (9th Cir. 1952) ('The Company claims that it is a denial of due process not to give a mandatory right to file a reply brief. We know of no such requirement.').

In their reply brief to the Eighth Circuit, petitioners replied to that frivolous attempt to controvert their argument as follows:

> In ostensible defense of the district court's thoughtless issuance of its affirming Order before Floret's time to appeal had run, the Fredrikson & Byron defendants cite two inapposite cases for the proposition that Floret did not have a 'mandatory right' to file a reply brief. Inapposite because, in *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 888 (9th Cir. 2001), the right to submit a reply brief was not provided for in the rules concerning an application to the district court for certification to file an interlocutory appeal; and, in *NLRB v. Eclipse Lumber Co.*, 199 F.2d 684, 686 (9th Cir. 1952), where the Board's general counsel filed exceptions to the Board's decision, the right of the respondent to file a reply was subject to 'such terms as the Board may impose.' With equal irrelevancy, the same can be said for non-dispositive motions brought pursuant to, *e.g.*, D. Minn. Loc. R. 7.1(a), which in practice is read to prohibit the submission of a reply memorandum of law even though it neither expressly permits or prohibits it.

In oblivious reliance on the Fredrikson & Byron's argument, the deceived Eighth Circuit held in pertinent part:

> We find no error in the district court's decision to issue its opinion before Floret filed its reply brief. Floret has failed to demonstrate that it had any additional

> arguments that had not already been advanced in its opening brief, nor does Floret cite any case law that suggests that the district court's actions constitute reversible error. *See City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 888 (9th Cir. 2001)

Pet. App. 6a-7a.

The pertinent, straightforward, and indisputable facts of *Baykeepter* and *Eclipse* were set out with precision in petitioners' motion memorandum. Pet. App. 15a-23a. The "reply brief" referenced in *Baykeeper* was not an *appellate* reply brief, while the agency rules in *Eclipse* permitted the filing of a "reply brief" that in reality was a *answering* brief that could only be filed with leave of the NLRB. In *Baykeeper*, the so-called "reply brief" was a *motion reply memorandum of law* which Kaiser wanted to submit in response to Baykeeper's memorandum in opposition to Kaiser's motion for a district court order certifying an interlocutory order. After learning that the Ninth Circuit had ruled that the district court had jurisdiction to rescind the certification order, Kaiser argued to the Ninth Circuit that it had been denied due process because the district court had not required the filing of a reply to Baykeeper's opposition memorandum before the certification order was rescinded. In *Eclipse*, the administrative agency's rules permitted a losing party to submit a brief excepting to a trial examiner's report and permitted the prevailing party to submit a brief in support of the trial examiner's report, with both to be submitted within a specified time following the issuance of the report. The NLRB's general counsel filed a brief excepting to the trial examiner's report. Eclipse filed nothing but later moved for leave to file a brief (*i.e.*, a so-called "reply brief") in *response* to the general counsel's brief. A party desiring to submit a brief in response to the opposing party's initial brief was required to obtain permission to do so from the NLRB. After prevailing-party Eclipse's motion for such permission was denied, the NLRB reversed the trial

examiner and then petitioned the Ninth Circuit to enforce the reinstatement order. Eclipse argued to the Ninth Circuit that it had been denied due process because the NLRB's rules did not provide a mandatory right to file a "reply" to the general counsel's brief.

To controvert petitioners' argument that the district court's inherently prejudicial denial of due process was reversible error, the Fredrikson & Byron respondents' attorneys resorted to telling the Eighth Circuit that "federal courts that have examined *this issue* have concluded that due process does not require a mandatory right to file a reply brief," That was at once an exaggeration and a knowingly false representation of the law. Two cases in the same circuit do not constitute federal "courts" (plural), and both of the cases which the Fredrikson & Byron respondents' attorneys cited as having examined "this issue" (*Baykeeper* and *Eclipse*) were Ninth Circuit cases.

The issue "examined" in *Baykeeper* was whether the rules *should have* provided a mandatory right to file a memorandum of law in reply to a memorandum that had been filed in opposition to the motion memorandum. The issue "examined" in *Eclipse* was whether the administrative agency's rules *should have* provided a mandatory right to file a brief *in response to* the opposing party's initial brief. Neither *Baykeeper* nor *Eclipse* "examined" the issue at bar (whether a district court sitting as an appellate court may issue a decision before a party's time to file an appellate reply brief as a matter of right has run). The issue at bar was *not* whether the rules *should have* provided a right to file a reply brief in an appeal from the bankruptcy court. They did,[8] and thus *Baykeeper* and *Eclipse* are

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8 A right to file a reply brief was mandated in the district court's Briefing Schedule for Bankruptcy Appeals ("Appellant may submit an original and two copies of a reply brief within 10 days after service of appellee's brief.") (emphasis in original) and is mandated in Fed. R. Bankr. P. 8009(3) ("The appellant may serve and file a reply brief within 10 days after service of the brief of the appellee, . . .

unmistakably inapposite. That is inarguable, and it was unethical and dishonest for the Fredrikson & Byron respondents' attorneys to argue otherwise.

The Fredrikson & Byron respondents' attorneys knew what a motion memorandum is, and they knew that a motion memorandum of law is not an appellate brief just because a court refers to it as a reply brief. They also knew that a response or answering brief is not a reply brief just because a court refers to it as a reply brief. And those attorneys knew that Kaiser's argument in *Baykeeper* was no different than speciously arguing that D. Minn. Loc. R. 7.1(a) [Nondispositive Motions] denies due process because it does not provide for the filing of a reply memorandum in support of a non-dispositive motion. In practice, moreover, that rule is read to prohibit such a filing.

Because they could not, the Fredrikson & Byron respondents' attorneys did not challenge any aspect of petitioners' motion argument and its precise explanation of the course of proceedings in *Baykeeper* and *Eclipse*. Pet. App. 24a-26a. Instead, those attorneys resorted to writing a tiny, two-paragraph "analysis" which was at once a straw man, a red herring, *ignoratio elenchi*, and a *non-sequitur*–sophistries which are deceptive by definition. *Id.* at 25a-26a; *see generally* Pet. App. 27a-30a. The Eighth Circuit could not but have known it was deceived.

In the world in which the Fredrikson & Byron respondents' attorneys reside, simply re-stating their deceptive citation of *Baykeeper* proved that they did not engage in deception when they cited it in the first place. Their conclusory argument was a straw man because it misrepresented petitioners' position so as to more easily attack it and knock it down before concluding that petitioners' actual and irrefutable position was refuted without ever confronting it. Their argument was a red herring because it was an attempt to divert the Eighth Circuit's attention away from the irrefutable points made in petitioners' motion

.").

memorandum and to deceive the Eighth Circuit into thinking that it had correctly ruled that it was not reversible error for the district court to have issued its decision before petitioners filed their reply brief. Their argument was *ignoratio elenchi* because it supported one conclusion to prove a different conclusion, *i.e.*, they contended that *Baykeeper* stands for an irrelevant proposition so as to show that *Baykeeper* was therefore dispositive of the issue at bar, even though the issue at bar was *not* whether the rules *should have* provided a right to file a reply brief in an appeal from the bankruptcy court. Petitioners had no reason to argue that rules should have provided what they already provided. *See, e.g.*, Fed. R. Bankr. P. 8009(3) ("The appellant may serve and file a reply brief within 10 days after service of the brief of the appellee, ...").

The only other argument posited by the Fredrikson & Byron respondents' attorneys in opposition to petitioners' motion was just as illogical. It was a *non-sequitur* that rested on the foregoing erroneous premise that petitioners disputed the proposition that due process does not require a mandatory right to file a reply brief ("Because the court cited *Baykeeper* for the very proposition disputed by appellants, appellants have no legitimate basis for claiming that appellees' conduct constituted intentional or reckless disregard of their duties to this court.") (emphasis in original). Pet. App. 25a-26a. That argument was a *non-sequitur* because it drew a conclusion from a premise that had no connection to it.

Even if the misrepresentation of petitioners' position were to be omitted by dropping the phrase "disputed by appellants," their argument would still have been a logical fallacy: *I.e.*, it would still have been a *non-sequitur* if the Fredrikson & Byron respondents' attorneys had said, *e.g.*, "Because the court cited *Baykeeper* for the proposition that due process does not require a mandatory right to file a reply brief, appellants have no legitimate basis for claiming that appellees' conduct constituted intentional

or reckless disregard of their duties to this court." And it would still have been a *non-sequitur* if the wording had represented petitioner's position correctly: *I.e.*, it would still have been a *non-sequitur* if those attorneys had said, *e.g.*, "Because the court cited *Baykeeper* for the proposition not disputed by appellants, appellants have no legitimate basis for claiming that appellees' conduct constituted intentional or reckless disregard of their duties to this court." Their single-sentence argument remains a *non-sequitur* because, at base, the proposition for which *Baykeeper* stands is irrelevant to the issue at bar. The Fredrikson & Byron respondents' attorneys simply argued that there was no basis for petitioners' motion because the court based its decision on *Baykeeper*, or, in other words, only unsuccessful deceptions are unethical and sanctionable.

When petitioners distinguished *Baykeeper* and *Eclipse* in their reply brief to the Eighth Circuit, the Fredrikson & Byron respondents' attorneys did nothing to mitigate the potential success of their deception; when the parties were informed that oral argument was cancelled and that the appeal would be decided on the briefs and the record, those attorneys again did nothing to mitigate the potential success of their deception; and when they learned that the Eighth Circuit had relied on *Baykeeper* to find no error in the district court's issuance of its decision before petitioners' time to file a reply brief had run, those attorneys did nothing to correct what they knew was the court's unjustified and unjustifiable adoption of their frivolous argument. The Eighth Circuit was clearly deceived into making an erroneous ruling on a dispositive issue, the result of which is that the Eighth Circuit's published decision now leads the district courts to believe that, when sitting as appellate courts, they can ignore the procedural rules with impunity. It was not within the Eighth Circuit's discretion to ignore petitioners' motion for appellate sanctions under the circumstances, and petitioners thus are owed a ruling.

CONCLUSION

For the foregoing reasons, the petition for a writ of mandamus should be granted, and the writ should require the Eighth Circuit to rule on petitioners' appellate motion for sanctions and provide the legal and factual basis for its ruling.

Respectfully submitted,

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Attorney for Petitioners

APPENDIX A: ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED ON FEBRUARY 26, 2003

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UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 02-1683

In re: Thomas M. Sendecky	*	
	*	
Debtor,	*	Appeal from the
	*	United States
Floret, LLC, Michele Lea Eggert,	*	District Court
	*	for the District of
Appellants,	*	Minnesota
	*	
v.	*	
	*	
Thomas J. Sendecky; et al,	*	
	*	
Appellees.	*	

After consideration of the court, appellant's motion for stay of mandate pending the filing of a writ of certiorari is denied.

February 26, 2003

Order entered at the Direction of the Court:
s/Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B: ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED ON FEBRUARY 14, 2003

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UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 02-1683

Floret, LLC and Michele Lea Eggert,	*	
	*	Order Denying
	*	Petition for
Appellants,	*	Rehearing and
	*	Rehearing En
v.	*	Banc
	*	
Thomas J. Sendecky; et al,	*	
	*	
Appellees.	*	

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

February 14, 2003

Order entered at the Direction of the Court:
s/Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX C: ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED ON FEBRUARY 6, 2003

***

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 02-1683

In re: Thomas M. Sendecky	*	
	*	
Debtor,	*	Appeal from the
	*	United States
Floret, LLC, Michele Lea Eggert,	*	District Court
	*	for the District of
Appellants,	*	Minnesota
	*	
v.	*	
	*	
Thomas J. Sendecky; et al,	*	
	*	
Appellees.	*	

After consideration of the district court's order for sanctions is affirmed.

Appellees' motion for attorneys' fees in the sum of $3,954.70 is granted.

February 6, 2003

Order entered at the Direction of the Court:
s/Michael E. Gans
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D: ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT, FILED ON JANUARY 6, 2003

***

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 02-1683

In re: Thomas M. Sendecky	*	
	*	
Debtor,	*	Appeal from the
	*	United States
Floret, LLC; Michele Lea Eggert,	*	District Court
	*	for the District of
Plaintiffs-Appellants,	*	Minnesota
	*	
v.	*	
	*	
Thomas M. Sendecky,	*	
	*	
Defendant,	*	
	*	
Thomas J. Sendecky; Gregory M. Hewitt; Hewitt Financial Services; Fredrikson & Byron, P.A.; Rick Petry,	*	
	*	
Defendants-Appellees.	*	

Submitted: December 9, 2002
Filed: January 6, 2003

Before WOLLMAN, HEANEY, and MELLOY, Circuit Judges.

HEANEY, Circuit Judge.

Floret, LLC and Michele Lea Eggert appeal from a district court order affirming the bankruptcy court's dismissal of five of the six defendants from an adversary proceeding and the bankruptcy court's sanctioning of Floret's attorney. We affirm.

On June 5, 2001, a state court judgment for breach of contract was entered against Thomas M. Sendecky in the sum of $16,253.19. To collect on the judgment, Floret served Thomas M. Sendecky with garnishment papers on June 18, 2001. Seven days later, Thomas M. Sendecky filed for Chapter 7 bankruptcy.

Thereafter, Floret filed an adversary action against Thomas M. Sendecky and Thomas J. Sendecky, Gregory Hewitt, Hewitt Financial Services, Fredrikson & Byron PA, and Rick Petry seeking to prevent entry of the discharge pursuant to 11 U.S.C. 727(c). The thrust of the complaint was that Thomas M. Sendecky lied on his petition for bankruptcy in an effort to avoid paying the debt he owed Floret and the other defendants had conspired with him in his efforts. The bankruptcy court dismissed the claims against all defendants save one with prejudice. It dismissed Floret's complaint against Thomas M. Sendecky without prejudice and granted leave to file an amended complaint within ten days. It also awarded Hewitt and Fredrikson & Byron their costs and attorney's fees in the sum of $3,535 pursuant to Federal Rules of Bankruptcy Procedure 9011.

Floret filed an appeal with the United States District Court for the District of Minnesota. The district court had difficulty discerning the basis of Floret's complaint. It stated:

> From what the Court can discern, Floret seems to allege that the Appellees had some obligation to come forward and tell the Bankruptcy Court that Thomas M. Sendecky

> did not owe them any money .... Floret also seems to suggest that Appellees somehow conspired with Thomas M. Sendecky to fabricate these false debts so that Thomas M. Sendecky's petition for bankruptcy would be accepted and the debts owed to Floret would be discharged.

In re Sendecky, No. 01-42790, 2002 WL 341037, 1 (D. Minn. 2002). Floret also alleged that the bankruptcy court should have applied the theory of equitable subordination to its case, despite Floret's failure to mention equitable subordination in any of its prior briefs. The district court affirmed the bankruptcy court in all respects before Floret had an opportunity to file a reply brief.

Floret appeals to this court. He questions the decision of the district court to deny relief before Floret had an opportunity to file its reply brief and then argues that the appellees had a duty to tell the court what was or was not owed to them by Thomas M. Sendecky and that its claim against the other creditors should be considered a claim for equitable subordination. The district court held that none of the theories support the appellants' claim. We agree. It is clear from the complaint and the answers that no valid cause of action was stated against the appellees. These creditors may be appropriate witnesses in Floret's adversary proceeding, but they are not appropriate defendants. Moreover, as the district court pointed out, Floret's claim for equitable subordination must fail because there are no assets in the estate to distribute. In re Danbury Square Assocs., 153 B.R. 657, 661 (Bankr. S.D.N.Y. 1993). We find no error in the district court's decision to issue its opinion before Floret filed its reply brief. Floret has failed to demonstrate that it had any additional arguments that had not already been advanced in its opening brief, nor does Floret cite any

case law that suggests that the district court's actions constitute reversible error. See City of Los Angeles v. Santa Monica Baykeeper, 254 F.3d 882, 888 (9th Cir. 2002).

The district court also held that the bankruptcy court did not abuse its discretion in awarding fees and costs to Hewitt and Fredrikson & Byron. We find no abuse of discretion in this award.

The order of the district court is affirmed in all respects.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT

APPENDIX E: ORDER OF UNITED STATES DISTRICT COURT FOR DISTRICT OF MINNESOTA, FILED ON FEBRUARY 28, 2002.

***

UNITED STATES D1STRICT COURT
DISTRICT OF MINNESOTA

In re:

Bky. No. 01-42790 (hICD)
Chapter 7 Bankruptcy

Thomas M. Sendecky,

Debtor.

Adv. No. 01-4253 (N'CD)

Floret, LLC and Michele Lea Eggcrt,

Plaintiffs,

v.

Thomas M. Sendecky,
Thomas J. Sendecky,
Gregory M. Hewitt,
Hewitt Financial Services,
Fredrickson & Byron, P.A.,
and Rick Petry,

Defendants.

Floret, LLC and Michele Lea Eggert,

Civ. No. 02-902 (DF)

Appellants,

:. MEMORANDUM
OPINION AND ORDER

Thomas 1 Sendecky,
Gregory M. Hewitt,
Hewin Financial Services,
Frednckson & Byron, P.A.,
and Rick Petry,

Appellees.

Alired M. Stanbury, Esq., Stanbury Law Office, 2009 St. Anthony Parkway, Minneapolis, M~' SS4l 8, counsel for Plaintiff-Appellants.

Thomas M. Sendecky, 5912 Diamond Lake Lane, Minneapolis, MN 55419, Defendant *pro se.*

Thomas J. Sendecky, 591' Viamond Lakc Lane, Minneapolis. MN 55419, Defendant-Appellee *pro se.*

Thomas J. Flynn, Esq., Larkin Hoffinan Daly & Lindgren, 1500 Wells Fargo Plaza, 7900 Xerxes Avenue South, Bloomington, MN 55431, counsel for Defendant-Appellees Gregory M. Hewitt and Hesvitt Financial Services.

David R. Marshall, Esq., and Gregory E. Karpenko, Esq., Fredrikson &: Byron, 1100 International Center, 900 Second Avenue South, Mirmeapolis, MN 55402-3187, counsel for Defendant-Appellees Fredrickson & Byron, P.A. and Rick Petry.

Introduction

The above-entitled matter is before the Court on Floret, LLC and Michele Lea Eggert's appeal from two November 29, 2001 Orders of United States Bankruptcy ludge Nancy C. Dreher in the adversary proceeding captioned Floret, LLC and Michele Lea Eggert v. Thomas M. .Scndecky, et al., Adv. No. 01-4253. Floret, LLC and Michelc Lea Eggert (collectively, "Floret")

appeals from the Orders that: (a) dismissed all claims against the Appellees; (b) denied Floret leave to amend its complaint as against Appellees; and (c) imposed sanctions pursuant to Bankruptcy Rule 9011.

In addition, Appellees Gregory M. Hewitt and Hewitt Financial Serviccs have brought a motion for sanctions.

Background

This case arises out of thc Chapter 7 bankruptcy petition of Thomas M. Sendecky.[1] Thc Appellants (collectively, "Floret") are creditors of Thomas M. Sendecky, having obtained a judgment against him in prior litigation.

Thc Appellees ar all entities listed as creditors on Thomas M. Sendecky's petition for bankruptcy. Thomas J. Sendecky is Thomas M. Sendecky's father. Gregory Hewitt and Hewitt Financial Services (collectively "Hewitt") were co-defendants of Thomas M. Sendecky in the prior litigation. Rick Petry is an attorney with Fredrickson & Byron, P.A.; he represented both Thomas M.. Sendecky and Hewitt in the prior litigation. In his petition for bankruptcy, Thomas M. Sendecky apparently asserted that he owed his father a substantial sum of money, that he owed Fredncksoη & Byron money for legal fees, and that he owed Hewitt for a portion of the legal fees paid by Hewitt to Fredrickson & Byron.

Thomas M. Sendecky filed for Chapter 7 bankruptcy on June 25, 2001. His debts were duly discharged.

Floret filed the underlying adversary action against Thomas M. Sendecky and the Appellees, apparently seeking revocation of the discharge pursuant to I I U.S.C. § 727(c). Floret asserts that

---

1 The Bankruptcy Court dismissed the claims against Thomas M. Sendecky, but granted Floret leave to amend the complaint against Thomas M. Sendecky. Accordingly, Floret's claims against Thomas M. Sendecky are not a subject of this appeal.

Thomas M. Sendecky did not owe any money to Thomas J. Sendecky, Fredrickson & Byron, or Hewitt. Floret asserts that Thomas M. Sendecky lied on his petition for bankruptcy in an effort to avoid paying the genuine debt he owed to Floret.

The complaint in the adversary proceeding did not seek any form of relief from or state any legal basis of a claim against any of the Appellees. Even now, after the Bankruptcy Court proceedings and the briefs associated with this appeal, the basis for Floret's claims against the Appellees remains unclear. From what the Court can discern, Floret seems to allege that the Appellees' had some obligation to come forward and tell the Bankruptcy Court that Thomas M. Sendecky did not owe them any money, that the petition was inaccurate. Floret also seems to suggest that Appellees somehow conspired with Thomas M. Sendecky to fabricate these false debts so that Thomas M. Sendecky's petition for bankruptcy would be accepted and the debts owed to Floret would be discharged.

In a November 29, 2001 hearing, Judge Nancy C. Dreher dismissed the claims against the Appellees and denied Floret an opportunity to amend his complaint. Judge Dreher also awarded Hewitt and Fredrickson & Byron their fees and costs pursuant to Bankruptcy Rule 9011. Floret has appealed those decisions.

Discussion

1. Standard of Review

On appeal of a final order, the District Court conducts a *de novo* review of the legal determinations of the Bankruptcy Court. *See Pagosa Lakes Property Owners Ass'n v. Fairfield Pagosa, Inc. (In re Fairfield Pagosa, Inc.)*, 97 F.3d 247, 252 (8th Cir. 1996). The Bankruptcy Court s decision to impose attorneys' fees and costs is reviewed under the abuse-of-discretion. standard. *See In re Kujawa.* 2?0 F.3d 578, 581-82 (847-Cir. 2001).

2. Bankruptcy Court's Order of Dismissal

The Bankruptcy Court properly dismissed the claims against the Appellees, to the extent that there

were any claims pled. Floret is seeking to revoke the discharge of its debt pursuant to I I U.S.C.. § 727(c). The debtor's other creditors are not proper defendants in such an action. Floret seems to feel that the other creditors should be defendants because it was their fraud and their complicity in Mr. Sendecky's fraud which forms the basis for the 727(c) claim. Floret is wrong. The other creditors may be appropriate witnesses in Floret's adversary proceeding, but they are not appropriate defendants.

On appeal, Floret claims that his claim against the other creditors should be considered a claim for equitable subordination[2]; that, because of the other creditors' fraud or their complicity in Mr. Sendecky's fraud, their claims should be subordinate to Floret's. Again, Floret is woefully misled.

Floret's equitable subordination argument fails for a number of reasons, but the most obvious is that equitable subordination is a moot issue in a no-asset proceeding such as this. The trustee has declared that there are no assets in the estate to distribute. "If there is going to be no bankruptcy distribution, equitable subordination is meaningless." *In re Danhury Square Assocs.*, 153 B.R. 657, 661 (Bankr. S.D.N.Y. 1993). That principle should be self-evident. Equitable subordination is a doctrine which is applied in determining which of a number of creditors is first in line to be reimbursed. Applying equitable subordination in the case of a no-asset estate would be tantamount to determining who is first in line for an empty buffet.

If Floret convinces a court to revoke the discharge of debts in Mr. Sendecky's bankruptcy, and *if* there

---

2 The phrase "equitable subordination" is not anywhere in Floret's complaint and it was never uttered in the hearing before Judge Dreher. Floret's rather novel assertion is that Judge Dreher, having great familiarity with the law of bankruptcy, should have understood that Floret should have been couching his claims in terms of equitable subordination. The Court strongly believes that the law imposes no such obligation on any judge.

were any assets to distribute amongst Mr. Sendecky's creditors, and *if* any of the other creditors were to subsequently make a claim on Mr. Sendecky's estate, the doctrine of equitable subordination might become relevant. But it is certainly not relevant now and is not an adequate basis upon which to drag these four Appellees into litigation.

3. Bankruptcy Court's Award of Fees and Costs

The Bankruptcy Court did not abuse its discretion in awarding fees and costs to Hewitt and Fredrickson & Byron. Florct contends that the Bankruptcy Court should not have imposed sanctions because that court should have been able to divine Floret's equitable subordination claim from the bald accusations of the complaint. Yet, even if the Bankruptcy Court had looked at the complaint and somehow ascertained that Floret was attempting to claim equitable subordination, the court would have been justified in imposing sanctions because an equitable subordination claim is so clearly inapplicable to this case.

The Court further concludes that the Bankruptcy Court did not abuse its discretion in determining that $165 per hour was a reasonable fee for Mr. Karpenko

4. Hewitt's Motion for Sanctions

Appellees Gregory M. Hewitt and Hewitt Financial Services have brought a motion for sanctions pursuant to Bankruptcy Rule 9011 and Rule 11 of the Federal Rules of Civil Procedure. These Appellees have requested their attorneys' fees and costs associated with this appeal.

Although it appears to the Court that such sanctions would be entirely appropriate, the Court finds that it has not yet afforded Floret a reasonable opportunity to respond. Therefore, the Court will deem the Motion for Sanctions to be pending.

For the reasons stated, **IT IS HEREBY ORDERED:**

1. The Order of Dismissal and of Sanctions of the United States Bankruptcy Court for the District of Minnesota is **AFFIRMED.**

Dated: 2/28/02

s/ Donovan W. Frank

DONOVAN W. FRANK
Judge of United States
District Court

APPENDIX F: PETITIONERS' MOTION FOR APPELLATE SANCTIONS PURSUANT TO 28 U.S.C. § 1927 AND THE EIGHTH CIRCUIT'S INHERENT POWER, DATED JANUARY 18, 2003

***

MOTION

Appellants Floret, L.L.C., and Michele Lea Eggert (hereinafter "Floret") move for an order imposing monetary sanctions on Fredrikson & Byron attorneys Gregory Karpenko and David Marshall for their knowingly false representations of law to this court and for their silence in the face of this court's dispositive reliance on those false representations. Such sanctions are sought under 28 U.S.C. § 1927 and the inherent power of this court. A motion for appellate sanctions may be brought at any time prior to entry of a final judgment. *Mary Anne Pensiero, Inc. v. Lingle*, 847 F.2d 90, 99-100 (3d Cir. 1988). 28 U.S.C. § 1927 [Counsel's Liability For Excessive Costs] provides:

> Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct.

Like § 1927 sanctions, inherent power sanctions may be awarded by appellate as well as district court judges. *In re Kelly*, 841 F.2d 908, 917 (9th Cir. 1988). Since inherent power sanctions are indifferent to the underlying merits of a dispute, they serve a gap-filling function by permitting appellate courts to award sanctions to an appellant--whether prevailing or nonprevailing--or to a nonprevailing appellee. *Id.* at 917; *State Indus. v. Mor-Flo Indus.*, 948 F.2d 1573 (Fed. Cir. 1991).

FACTS

In their Brief at 6, the Fredrikson & Byron appellees argued:

> Not surprisingly, Floret has offered no legal authority in support of its assertion that it had a mandatory right to file a reply brief or that the timing of the district court's decision compels this court to vacate the district court's decision. To the contrary, federal courts that have examined the issue have concluded that due process does not require a mandatory right to file a reply brief. *See City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 888 (9th Cir. 2001); *NLRB v. Eclipse Lumber Co.*, 199 F.2d 684, 686 (9th Cir. 1952) ('The Company claims that it is a denial of due process not to give a mandatory right to file a reply brief. We know of no such requirement.').

Floret replied as follows in its Reply Brief at 3:

> In ostensible defense of the district court's thoughtless issuance of its affirming Order before Floret's time to appeal had run, the Fredrikson & Byron defendants cite two inapposite cases for the proposition that Floret did not have a 'mandatory right' to file a reply brief. Fredrikson & Byron Br. at. 6-7. Inapposite because, in *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 888 (9th Cir. 2001), the right to submit a reply brief was not provided for in the rules concerning an application to the district court for certification to file an interlocutory appeal; and, in *NLRB v. Eclipse Lumber Co.*, 199 F.2d 684, 686 (9th Cir. 1952), where the Board's general counsel filed exceptions to the Board's decision, the right of the respondent to file a reply was subject to 'such terms as the Board may impose.' With equal

> irrelevancy, the same can be said for non-dispositive motions brought pursuant to, *e.g.*, D. Minn. Loc. R. 7.1(a), which in practice is read to prohibit the submission of a reply memorandum of law even though it neither expressly permits or prohibits it.

In the panel's published Opinion filed January 6, 2003, the panel held in pertinent part:

> We find no error in the district court's decision to issue its opinion before Floret filed its reply brief. Floret has failed to demonstrate that it had any additional arguments that had not already been advanced in its opening brief, nor does Floret cite any case law that suggests that the district court's actions constitute reversible error. *See City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882, 888 (9th Cir. 2001)
>
> *
> *
> *
>
> The order of the district court is affirmed in all respects.

A copy of *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882 (9th Cir. 2001) is attached as Exhibit 1. The pertinent, straightforward, and indisputable facts of *Baykeeper* are these:

- Baykeeper, a non-profit environmentalist corporation, sued the Harbor Division of Los Angeles and Kaiser International for violations of the Clean Air and Water Act. *Id.* at 884
- City and Kaiser moved to dismiss pursuant to Rule 12. *Id.*
- The district court dismissed some but not all of Baykeeper's claims. *Id.*
- As to the claims not dismissed, City and Kaiser each moved the district court for an order certifying an interlocutory appeal. *Id.*
- The district court scheduled a hearing. *Id.*

- Before the date of the hearing, the district court issued an order certifying the interlocutory appeals. *Id.*
- Unaware of the entry of that order, Baykeeper the next day filed an opposition to the motions. *Id.*
- City and Kaiser filed petitions with the Ninth Circuit seeking certifications of their respective appeals. *Id.*
- The district court rescinded its certification order before the any action was taken by the Ninth Circuit. *Id.*
- The Ninth Circuit approved City's and Kaiser's petitions two months later. *Id.*
- The Ninth Circuit ruled that the district court had plenary power over an interlocutory order and thus retained authority to reconsider, rescind, or modify its certification order. *Id.* at 886.
- Kaiser argued that the district court should have required the filing of a reply to Baykeeper's opposition memorandum before rescinding the certification order. *Id.*
- The Ninth Circuit rejected Kaiser's argument for two reasons: (1) Kaiser had voluntarily decided at the time to not file a reply to Baykeeper's opposition memorandum and (2) the district court had never prevented Kaiser from replying to Baykeeper's opposition memorandum. *Id.* at 888.
- Citing *NLRB v. Eclipse Lumber Co.*, 199 F.2d 684, 686 (9th Cir. 1952) ("The Company claims that it is a denial of due process not to give a mandatory right to file a reply brief. We know of no such requirement."), the Ninth Circuit also observed that even if Kaiser had been prevented from filing such a reply, that would not have constituted reversible error. *Id.*

A copy of *NLRB v. Eclipse Lumber Co.*, 199 F.2d 684 (9th Cir. 1952) is attached as Exhibit 2. The pertinent, straightforward, and indisputable facts of *Eclipse* are these:

- Pursuant to a provision in its union-shop agreement and at the union's request, Eclipse dismissed

a union employee for non-payment of dues. *Id.* at 685.

- The dismissed employee claimed that the dismissal violated the Labor Management Act. *Id.* at 685.
- The agency trial examiner found for Eclipse. *Id.* at 686.
- NLRB regulations provided that the non-prevailing party could file exceptions to a trial examiner's report and the prevailing party could file a brief in support of the trial examiner's report within 20 days or a further extended time, and in this case the time was extended. *Id.*
- The NLRB's general counsel filed a brief excepting to the trial examiner's report, but Eclipse filed nothing. *Id.* at 685.
- Eclipse later moved for leave to file a reply to the general counsel's brief excepting to the trial examiner's report. *Id.*
- NLRB regulations provided that: " * * * Upon special leave of the Board, any party may file a reply brief upon such terms as the Board may impose. * * *" *Id.*
- The NLRB denied Eclipse's motion. *Id.*
- The NLRB overruled the trial examiner and ordered Eclipse to reinstate the dismissed employee. *Id.*
- The NLRB petitioned the Ninth Circuit to enforce its reinstatement order. *Id.*
- Eclipse claimed that the NLEB's rules denied due process by not providing a mandatory right to file a reply brief. *Id.*
- The Ninth Circuit held that it knew of no requirement to give a mandatory right to file a reply brief. *Id.*

ARGUMENT

Minn. R. Prof. Conduct 3.1 [Meritorious Claims and Contentions] provides in pertinent part: "A lawyer shall not . . . controvert an issue [in a proceeding] unless there is a basis for doing so that is not frivolous, .

..." Comment 1985 to Minn. R. Prof. Conduct 3.3(a)(3) [Candor Toward The Tribunal] states in pertinent part: "Legal argument based on a knowingly false representation of law constitutes dishonesty toward the tribunal .... The underlying concept is that legal argument is discussion asking to determine the legal premises properly applicable to the case."

Baykeeper* And *Eclipse

The "reply brief" referenced in *Baykeeper* was not an appellate reply brief, while the agency rules in *Eclipse* permitted the filing of a "reply brief" that in reality was a *response* brief that could only be filed with leave of the NLRB. In *Baykeeper*, the "reply brief" was a *motion memorandum of law* which Kaiser wanted to submit in response to Baykeeper's memorandum in opposition to Kaiser's motion for a district court order certifying an interlocutory order. After learning that the Ninth Circuit had ruled that the district court had jurisdiction to rescind the certification order, Kaiser argued to the Ninth Circuit that it had been denied due process because the district court had not required the filing of a reply to Baykeeper's opposition memorandum before the certification order was rescinded. In *Eclipse*, the administrative agency's rules permitted a losing party to submit a brief excepting to a trial examiner's report and permitted the prevailing party to submit a brief in support of the trial examiner's report, with both to be submitted within a specified time following the issuance of the report. The NLRB's general counsel filed a brief excepting to the trial examiner's report. Eclipse filed nothing but later moved for leave to file a brief (*i.e.*, a "reply brief") in *response* to the general counsel's brief. A party desiring to submit a brief in response to the opposing party's initial brief was required to obtain permission to do so from the NLRB. After prevailing-party Eclipse's motion for such permission was denied, the NLRB reversed the trial examiner and then petitioned the Ninth Circuit to enforce the reinstatement order. Eclipse argued to the Ninth Circuit that it had been denied due process because the NLRB's rules did not

provide a mandatory right to file a reply to the general counsel's brief.

Fredrikson & Byron's Frivolous Argument

To controvert Floret's argument that the district court's inherently prejudicial denial of due process was reversible error, attorneys Karpenko and Marshall resorted to telling this court that "federal courts that have examined *this issue* have concluded that due process does not require a mandatory right to file a reply brief," Fredrikson & Byron defendants' Br. at 6 (emphasis added). Actually that was an exaggeration as well as a knowingly false representation of the law where two Ninth Circuit cases do not constitute federal "courts" (plural). The two Ninth Circuit cases which attorneys Karpenko and Marshall cited as having examined "this issue" were *Baykeeper* and *Eclipse*. The issue "examined" in *Baykeeper* was whether the rules should have provided a mandatory right to file a memorandum of law in reply to a memorandum that had been filed in opposition to the motion memorandum. The issue "examined" in *Eclipse* was whether the administrative agency's rules should have provided a mandatory right to file a brief *in response to* the opposing party's initial brief. Neither *Baykeeper* nor *Eclipse* "examined" the issue at bar (whether a district court sitting as an appellate court may issue a decision before an appellant's time to file a reply brief as a matter of right has run). Each is unmistakably inapposite. That is inarguable, and it was unethical and dishonest for attorneys Karpenko and Marshall to argue otherwise. The issue at bar was *not* whether the rules *should have* provided a right to file a reply brief in an appeal from the bankruptcy court. They did. That right was provided at the district court level by Fed. R. Bankr. P. 8009(3) ("The appellant may serve and file a reply brief within 10 days after service of the brief of the appellee, ...") and the district court's Briefing Schedule for Bankruptcy Appeals ("Appellant may submit an original and two copies of a reply brief within 10 days after service of appellee's brief.")–just as

such a right is provided in this court by Fed. R. App. 28(c) and in every briefing schedule sent to parties by this court after a notice of appeal is filed.

Attorneys Karpenko and Marshall knew and know what a motion memorandum is, and they know that it is not an appellate brief just because a court refers to it as a reply brief. They also know that a response or answering brief is not a reply brief just because a court refers to it as a reply brief. And attorneys Karpenko and Marshall know that Kaiser's argument in *Baykeeper* was no different than speciously arguing that D. Minn. Loc. R. 7.1(a) [Nondispositive Motions] denies due process because it does not provide for the filing of a reply memorandum in support of a non-dispositive motion and in practice is read to prohibit such a filing.

When Floret distinguished *Baykeeper* and *Eclipse* in its Reply Brief, attorneys Karpenko and Marshall did nothing to mitigate the potential success of their deception; when the parties were informed that oral argument was cancelled and that the appeal would be decided on the briefs and the record, attorneys Karpenko and Marshall again did nothing to mitigate the potential success of their deception; and when they learned that the panel had relied on *Baykeeper* to find no error in the district court's issuance of its decision before Floret's time to file a reply brief had run, attorneys Karpenko and Marshall did nothing to correct what they knew was the court's unjustified and unjustifiable adoption of their frivolous argument.

CONCLUSION

WHEREFORE, appellants Floret, L.L.C., and Michele Eggert respectfully move for an Order imposing monetary sanctions upon Fredrikson & Byron attorneys Gregory Karpenko and David Marshall pursuant to 28 U.S.C. § 1927 and this court's inherent power.

Respectfully submitted,

STANBURY LAW FIRM P.A.

DATED: 1/18/03

s/ Alfred Stanbury

ALFRED STANBURY
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2209 St. Anthony Parkway
Minneapolis, MN 55418
(612) 789-5060
ATTORNEY FOR
APPELLANTS

APPENDIX G: FREDRIKSON & BYRON'S AND RICK PETRY'S MEMORANDUM IN OPPOSITION TO PETITIONERS' MOTION FOR SANCTIONS, DATED JANUARY 27, 2003

***

INTRODUCTION

Appellees Fredrikson & Byron, P.A. and Rick Petry (hereinafter, "Fredrikson & Byron") respectfully submit this memorandum in opposition to Appellants Floret, L.L.C. and Michele Lea Eggert's motion for sanctions. On January 6, 2003, this Court affirmed the decision of the district court and directed Appellees to submit its attorneys fees and costs pursuant to Appellees' motion for sanctions pursuant to Federal Rule of Appellate Procedure 38. In apparent retaliation for Appellees' motion for sanctions, Appellants now assert that they are entitled to sanctions against counsel for Appellants. As set forth below, Appellants' motion is baseless and should be denied.

BACKGROUND

The facts giving rise to Appellant's appeal are set forth in detail in this Court's Order dated January 6, 2003. As set forth in the Court's Order, Appellants' appeal challenged, inter alia, the decision of the District Court to deny relief to Appellants before they filed a reply brief. On appeal, Appellees cited two reported Ninth Circuit decisions to this Court for the proposition that the timing of the District Court's decision did not constitute a denial of due process. The two cases at issue are City of Los Angeles v. Santa Monica Baykeeper, 254 F.3d 882 (9th Cir. 2001) and NLRB v. Eclipse Lumber Co., 199 F.2d 684 (9th Cir. 1952). This Court agreed and affirmed the decision of the District Court.

After the Court issued its order, Appellants filed the instant motion, asserting for the first time that Appellees intentionally misrepresented the holdings of Baykeeper and Eclipse in an effort to deceive the Court.

ANALYSIS

I. APPLICABLE LAW.

Section 1927 provides for sanctions against an attorney who "multiplies the proceedings in any case unreasonably and vexatiously." 28 U.S.C. § 1927. Courts have interpreted this statute to warrant sanctions when attorney conduct, "viewed objectively, manifests either intentional or reckless disregard of the attorneys' duties to the court. Lee v. L.B. Sales, Inc., 177 F.3d 714, 718 (8th Cir. 1999). Because section 1927 is penal in nature, it should be strictly construed. *See id.*

II. APPELLEES' (*SIC*) CLAIM FOR SANCTIONS IS WITHOUT MERIT.

Appellants' motion for sanctions fails for two reasons. First, Baykeeper and Eclipse do in fact stand for the proposition that due process does not require a mandatory right to file a reply brief. In Baykeeper, the Ninth Circuit concluded that if the district court had prevented one of the parties to the litigation from filing a reply brief, that decision would not constitute reversible error. Id. at 888. The Ninth Circuit concluded its analysis by stating:

> In fact, the only case law from this circuit addressing this issue supports a contrary conclusion. See NLRB v. Eclipse Lumber Co., 199 F.2d 684, 686 (9th Cir. 1952) ("The Company claims that it is a denial of due process not to give a mandatory right to file a reply brief. We know of no such requirement."

Id. Thus, Appellants' citations to Baykeeper and Eclipse were appropriate.

Any disagreement between counsel regarding the import of Baykeeper and Eclipse ended, however, when this Court cited Baykeeper for the proposition that the District did not commit reversible error when it issued its decision before Appellants filed a reply brief. See January 6, 2003 Order at 3. Because the Court cited Baykeeper for the very proposition disputed by

Appellants, Appellants have no legitimate basis for claiming that Appellees' conduct constituted intentional or reckless disregard of their duties to this Court.[1]

Despite numerous opportunities to do so, Appellants have yet to identify a legitimate basis for naming Appellees as defendants in this matter. Instead, Appellants have repeatedly demonstrated their willingness to engage in frivolous litigation tactics. This motion for sanctions is yet another example of Appellants disregard for the rule of law. The Court should not countenance this type of behavior and should deny Appellants' motion in its entirety.

CONCLUSION

For the foregoing reasons, Fredrikson & Byron and Rick Petry respectfully request that the Court deny Appellants' motion for sanctions in its entirety.

DATED: J/27/03 s/ Gregory Karpenko

David R. Marshall (#184457)
Gregory E. Karpenko (#286473)
FREDRIKSON & BYRON, P.A.
1100 International Centre
900 Second Avenue South
Minneapolis, MN 55402-3397
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(612) 789-5060
ATTORNEYS FOR APPELLEES
FREDRIKSON & BYRON AND
RICK PETRY

---

1 Appellants' motion is an implicit argument that this Court erred by citing Baykeeper.

APPENDIX H: PETITIONERS' MEMORANDUM IN REPLY TO FREDRIKSON & BYRON'S AND RICK PETRY'S OPPOSITION TO MOTION FOR SANCTIONS, DATED FEBRUARY 1, 2003

***

REPLY

Pursuant to Fed. R. App. P. 27(a)(4), as amended effective December 1, 2002, appellants Floret, L.L.C., and Michele Lea Eggert (hereinafter "Floret") submit this reply to the Fredrikson & Byron appellees' memorandum in opposition to Floret's motion for an order imposing monetary sanctions on Fredrikson & Byron attorneys Gregory Karpenko and David Marshall for their knowingly false representations of law to this court and for their silence in the face of this court's dispositive reliance on those false representations. Such sanctions are sought under 28 U.S.C. § 1927 and the inherent power of this court.

Because they cannot, the Fredrikson & Byron appellees have not challenged any aspect of Floret's argument and its precise explanation of the course of proceedings in *City of Los Angeles v. Santa Monica Baykeeper*, 254 F.3d 882 (9th Cir. 2001), and in *NLRB v. Eclipse Lumber Co.*, 199 F.2d 684 (9th Cir. 1952). Instead, the Fredrikson & Byron appellees have resorted to writing a tiny, two-paragraph[1] "analysis" which is at once a straw man, a red herring, *ignoratio elenchi*, and a *non-sequitur*. Those logical fallacies are sophistries, which by definition are deceptive. In their world, simply re-stating their deceptive citation of

[1] The third paragraph of the Fredrikson & Byron appellees' Analysis II is a mere example of panicked pots calling the kettle black after recognizing that any attempt to refute Floret's motion argument logically would be futile. Hence their resort to sophistries. The allegation that Floret has "repeatedly demonstrated a willingness to engage in frivolous litigation tactics" is unfounded and is itself a red herring and frivolous where the bankruptcy court did not permit any litigation to occur.

Baykeeper proves that they did not engage in deception when they cited it.

As one of two reasons why Floret's motion supposedly fails, the Fredrikson & Byron appellees state that *Baykeeper* and *Eclipse* "do in fact" stand for the proposition that due process does not require a mandatory right to file a reply brief--as though Floret argued that they do not. Fredrikson & Byron Mem. at 3; *compare* Floret Mem. at 7-8. Their conclusory argument is a straw man because it misrepresents Floret's position so as to more easily attack it and knock it down before concluding that Floret's actual and irrefutable position has been refuted without ever confronting it. Their argument is a red herring because it is an attempt to divert the court's attention away from the irrefutable points made in Floret's Memorandum and toward an unwarranted conclusion that it in fact was not reversible error for the district court to issue its opinion before Floret filed its reply brief--even though it should be intuitively obvious that it was. Their argument is *ignoratio elenchi* because it supports one conclusion to prove a different conclusion, *i.e.*, they have shown that *Baykeeper* stands for an irrelevant proposition so as to show that *Baykeeper* is therefore dispositive of the issue at bar, even though "the issue at bar was *not* whether the rules *should have* provided a right to file a reply brief in an appeal from the bankruptcy court." Floret Mem. at 7. One hardly needs to argue that rules should have provided what they already provided. *See, e.g.*, Fed. R. Bankr. P. 8009(3) and, incidentally, Fed. R. App. P. 27(a)(4) (the rule pursuant to which this reply memorandum is being filed).

The second of the Fredrikson & Byron appellees' two reasons why Floret's motion fails is just as illogical. It is a *non-sequitur* that rests on the foregoing erroneous premise that Floret disputed the proposition that due process does not require a mandatory right to file a reply brief. *See* F&B Mem. at 4 ("Because the court cited *Baykeeper* for the very proposition disputed

by appellants, appellants have no legitimate basis for claiming that appellees' conduct constituted intentional or reckless disregard of their duties to this court.") (emphasis in original). That argument is a *non-sequitur* because it draws a conclusion from a premise that has no connection to it. Even if the misrepresentation of Floret's position were to be omitted by dropping the phrase "disputed by appellants," their argument would still be a logical fallacy: *I.e.*, it would still be a *non-sequitur* if they had said, *e.g.*, "Because the court cited *Baykeeper* for the proposition that due process does not require a mandatory right to file a reply brief, appellants have no legitimate basis for claiming that appellees' conduct constituted intentional or reckless disregard of their duties to this court." And it would still be a *non-sequitur* if the wording had represented Floret's position correctly: *I.e.*, it would still have been a *non-sequitur* if they had said, *e.g.*, "Because the court cited *Baykeeper* for the proposition not disputed by appellants, appellants have no legitimate basis for claiming that appellees' conduct constituted intentional or reckless disregard of their duties to this court." Their single-sentence argument remains a *non-sequitur* because, at base, the proposition for which *Baykeeper* stands is irrelevant to the issue at bar. The Fredrikson & Byron appellees have simply argued that there is no basis for Floret's motion because the court based its decision on *Baykeeper*, or, in other words, only unsuccessful deceptions are unethical and sanctionable.

CONCLUSION

WHEREFORE, appellants Floret, L.L.C., and Michele Eggert respectfully move for an Order imposing monetary sanctions upon Fredrikson & Byron attorneys Gregory Karpenko and David Marshall pursuant to 28 U.S.C. § 1927 and this court's inherent power.

Respectfully submitted,

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s/ Alfred Stanbury

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